

stated that the accused looked to his right and to his left when he stood in front of the house when he and Manokaran rushed down, that the accused looked startled after arrest and that he stood normally and did not attempt to run away. This statement in my view did not contradict what PW4 said about his seeing the accused being in a state of fright when he was arrested and that he struggled and was restrained by Manokaran. PW3's statement that it was PW4 who handcuffed the accused did not in my view vitiate PW4's whole testimony as PW4 in examination-in-chief did testify that he had handcuffed the accused and it was only in cross-examination that he said Manokaran had done so. This contradiction on the part of PW4, in my view, was not serious and did not relate to the crucial fact that the accused was seen with the incriminating packet in his right hand. The accused himself in his evidence-in-chief stated at one point that it was an Indian police officer who had handcuffed both his hands and later on mentioned that he did not put up a struggle when PW4 handcuffed him. In all probability it was Manokaran who had clasped the handcuffs on the accused's hands. It was submitted in passing by counsel that it was unfortunate that Manokaran was not around to tell his tale and that no formal evidence had been furnished to establish his death. I did not think that Manokaran's evidence was essential to prove the prosecution case nor did I think it was necessary to establish his death formally as no attempt was made by counsel during cross-examination of PW3 and PW4 to question his existence when they referred to him as the deceased. I had no reason to doubt the veracity of PW3 and PW4. The defence version did not create any reasonable doubt as to the truth of the prosecution case. I, accordingly, found the accused guilty as charged and sentenced him to death.

Accused convicted.

Solicitors: *Syarikat Pritam Singh.*

Reported by *PS Ranjan*

A **Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd**

HIGH COURT (PENANG) — CIVIL SUIT NO 22-202-90
EDGAR JOSEPH JR J
8 SEPTEMBER 1990

B *Civil Procedure — Estoppel — Judgment in previous suit — Whether party to new action estopped by judgment — Estoppel against statute — Whether permitted*

Civil Procedure — Order extracted — Whether may be varied — Power of court to order variation

C *Contract — Terms — Implied by statute — Whether parties may contract out of such terms — Public policy*

D *Land Law — Lease — Option for renewal — Option not exercised — Lessee remaining in occupation and paying monthly rent — Tenancy exempt from registration created — Non-endorsement of such tenancy on register — Effect of — Charge over land subsequent to lease — Land sold — Whether purchaser's interest subject to lessee's interest — National Land Code 1965, ss 213(3), 221(4), 222(4), 223(1), 227(1), 228(1)(a), 267 & 316(1)*

Landlord and Tenant — Lease — Option for renewal — Option not exercised — Lessee remaining in occupation — Whether lessee a tenant on a monthly basis — Whether purchaser's interest subject to lessee's interest

E The defendants had purchased a certain immovable property at a public auction held pursuant to an order for sale made by the court under the provisions of the National Land Code 1965 upon the application of the party to whom the property was charged. Among the conditions of sale was condition 8 which provided that the property was sold subject to all existing tenancies, if any, and all claims of tenants and occupiers by contract, custom, statute or otherwise, and condition 12 which provided that 'upon payment of the balance of the purchase money the purchaser shall be let into possession or the receipt of the rents and profits of the properties'.

F On 22 March 1966, the plaintiffs had gone into occupation of the property pursuant to a registered lease granted by the previous owners. The lease was for a period of ten years but carried a term that the plaintiffs had the option to renew the lease for a period of ten years at an increased monthly rental and thereafter for a further period of ten years at a further increased monthly rental. It was a term of the lease that the plaintiffs, if desirous of exercising the option, had to give notice of their desire six months before the expiry of the period. The plaintiffs had not exercised the option in the manner or within the time specified or at all but had continued in occupation of the property. Upon expiry of the initial period of ten years, the then owners of the property had continued to receive rent from the plaintiffs.

G The defendants had taken out an originating summons claiming against the plaintiffs' possession of the property under O 89 of the Rules of the High Court 1980. Another judge had held in that case that the summary procedure under O 89 did not apply as the plaintiffs were tenants holding over after termination of their tenancy. The plaintiffs then commenced the instant action by writ of summons, claiming, inter alia, a declaration that they were the lawful tenants of the property, and an order that the defendants be restrained from interfering with or disturbing their lawful and actual possession and use of the property. The plaintiffs obtained on an ex parte ap-

plication an interlocutory injunction restraining the defendants from interfering with or disturbing their occupation and use of the property until further order. The defendants applied inter partes for an order, inter alia, for a declaration that possession of the property be delivered to them, that the injunction be discharged, that an injunction restraining the plaintiffs from interfering with the defendants' possession of the property be granted, and for damages. Among the defences raised by the plaintiffs was that the judgment of the court in the originating summons estopped the defendants from proceeding with their application. Following judgment in the present action, there arose a further issue, namely, as to whether the court had the power to vary its order after it had been extracted.

Held, allowing the defendants' application:

(1) It could not be gainsaid that upon expiry of the initial term of ten years the previous owners and the plaintiffs had agreed to continue the relationship of landlord and tenant on the basis of a monthly tenancy since the rent was payable with reference to the month.

(2) The ratio decidendi of the judgment in the originating summons was limited to the proposition that as the plaintiffs were tenants holding over after termination of their tenancy the summary procedure under O 89 was not applicable and nothing more. All other observations made in the judgment were thus of necessity obiter dicta.

(3) The plaintiffs had not, after the expiry of their lease, taken the precaution of protecting their short tenancy of less than three years by endorsement in the register document of title as provided for in s 316(1) of the National Land Code 1965. The effect of their omission was to defeat the plaintiffs' tenancy or, in other words, their tenancy was not binding on the defendants. As for any tenancy exempt from registration granted by the chargor after the date of registration of the charge concerned, and even with the consent of the chargee, it will not bind the purchaser unless it has become protected by an endorsement under s 316(1) of the Code prior to the date of registration of the certificate of sale. And, as for any tenancy exempt from registration granted by the chargor before the registration of the charge concerned — as in the present case, since the plaintiffs' lease expired on 21 March 1976, after which they held over as monthly tenants and the charge was registered later — it will not bind the purchaser unless it has become protected by endorsement prior to the date of registration of the charge.

(4) It made no difference that condition 8 of the conditions of sale had provided that the property was sold subject to all existing tenancies, if any, and all claims of tenants and occupiers by contract, custom, statute or otherwise. This condition must be understood to refer only to tenancies binding on the purchasers. Short tenancies of less than three years not protected by endorsement under s 316(1) of the Code were not binding on the defendants, and were obviously excluded from the contemplation of condition 8. In any event, any attempt to contract out of clear statutory provisions would be void and wholly ineffective as being contrary to public policy. Condition 12 must be read in the same light.

(5) The defendants were entitled to possession as the plaintiffs were in unlawful possession of the property, ie they were trespassers or, at most, bare licensees and, on the evidence, had been given ample notice before action. Furthermore, service of the summons-in-chambers was itself a notice of termination of the licence. Indeed, prior to the issue of the summons-in-chambers, the defendants' then solicitors had served the plaintiffs with a notice to quit dated 20 November

1980 requiring them to quit and deliver vacant possession within 14 days from the date of receipt thereof, which was more than sufficient notice to a bare licensee.

(6) The defence of estoppel based on the judgment of the other judge could not arise as there could be no estoppel against a statute, specifically the various provisions of the Code referred to.

(7) The declaratory order granted was to be varied so as to require the plaintiffs to deliver vacant possession forthwith to the defendants. Apart from the slip rule, the court has an inherent power to vary its own orders so as to bring it into harmony with the order which it obviously meant to pronounce. A mere declaratory order would not have conveyed the intention of the court.

C [Bahasa Malaysia summary]

Defendan-defendan telah membeli suatu harta tetapi di satu lelong awam yang diadakan berikutan dengan satu perintah jualan yang dibuat oleh mahkamah di bawah peruntukan Kanun Tanah Negara 1965 atas permohonan pihak yang memegang caj. Antara syarat-syarat jualan ialah syarat 8 yang memperuntukkan bahawa harta itu dijual tertakluk kepada semua penyewaan yang sedia ada, jika ada, dan semua tuntutan penyewa dan penduduk (occupiers), dan syarat 12 yang memperuntukkan bahawa 'upon payment of the balance of the purchase money the purchaser shall be let into possession or the receipt of the rents and profits of the properties'.

Pada 22 Mac 1966, pihak plaintif telah mula menduduki harta itu mengikut satu pajakan berdaftar yang diberikan oleh tuannya yang dahulu. Pajakan itu adalah bagi tempoh sepuluh tahun tetapi mengandungi satu syarat bahawa plaintif mempunyai pilihan membaharui pajakan itu bagi tempoh sepuluh tahun pada sewa bulanan yang lebih dan selepas itu bagi tempoh sepuluh tahun lagi pada sewa bulanan yang lebih tinggi. Adalah menjadi syarat pajakan itu bahawa jika plaintif memilih untuk melanjutkan pajakan, notis mesti diberikan enam bulan sebelum tamatnya tempoh itu. Plaintif tidak berbuat demikian tetapi terus menduduki harta itu. Selepas tamat sepuluh tahun yang pertama, tuannya pada masa itu telah terus menerima sewa daripada plaintif.

Pihak defendan telah mengeluarkan saman semula menuntut pemilikan harta itu daripada plaintif mengikut A 89 Kaedah-Kaedah Mahkamah Tinggi 1980. Seorang hakim yang lain telah memutuskan dalam kes yang sama bahawa prosedur terus di bawah O 89 tidak terpakai kerana plaintif adalah penyewa yang terus menduduki harta itu selepas tamatnya penyewaan mereka.

Plaintif kemudiannya memulakan tindakan ini dengan writ saman, menuntut, antara lain, satu deklarasi bahawa mereka adalah penyewa yang sah di sisi undang-undang, dan satu perintah supaya defendan disekat daripada mengganggu pemilikan harta itu oleh mereka. Plaintif memperoleh menerusi satu permohonan ex parte satu injunksi interlocutori untuk menyekat defendan daripada mengganggu pemilikan mereka hingga perintah seterusnya. Defendan memohon inter partes untuk perintah, antara lain, bagi deklarasi bahawa pemilikan harta itu diserahkan kepada mereka, bahawa injunksi itu dibatalkan, bahawa satu injunksi menyekat plaintif daripada mengganggu pemilikan oleh defendan diberikan, dan untuk gantirugi. Antara pembelaan yang dikemukakan oleh plaintif ialah penghakiman mahkamah dalam saman semula mengestop defendan daripada meneruskan permohonan mereka. Selepas penghakiman dalam kes ini, satu isu lain berbangkit, iaitu samada mahkamah mempunyai kuasa untuk mengubah perintahnya selepas ia telah diperolehi.

Diputuskan, meluluskan permohonan pihak defendan:

(1) Tidak boleh disangkal bahawa selepas tamatnya tempoh awal selama sepuluh tahun, tuannya dahulu dan plaintif telah bersetuju meneruskan hubungan tuantanah dan penyewa atas dasar penyewaan bulanan memandangkan yang sewa dibayar secara bulanan.

(2) Ratio decidendi penghakiman dalam saman pemula terhad kepada hujah bahawa memandangkan penyewa terus menduduki selepas tamatnya penyewaan mereka prosedur terus di bawah A 89 tidak terpakai dan tidak lebih daripada itu. Semua pemerhatian yang dibuat di dalam penghakiman itu sewajarnya adalah obiter dicta.

(3) Plaintif, selepas tamat pajakan mereka, tidak mengambil langkah melingungi penyewaan pendek mereka yang kurang daripada tiga tahun dengan pengendorsan di dalam surat-cara hakmilik daftaran seperti yang diperuntukkan di dalam s 316(1) Kanun Tanah Negara 1965. Kesan kegagalan mereka itu ialah penyewaan itu dialihkan, atau dalam perkataan lain, penyewaan mereka tidak mengikat defendan. Bagi penyewaan yang tidak perlu didaftar yang diberikan oleh pengadai selepas tarikh pendaftaran gadaian yang berkenaan, dan tidak kira kebenaran penerima gadaian, ia tidak akan mengikat pembeli melainkan jika ia dilindungi dengan satu pengendorsan di bawah s 316(1) Kanun itu sebelum tarikh pendaftaran sijil jualan. Bagi penyewaan yang tidak perlu didaftar yang diberikan oleh pengadai sebelum pendaftaran gadaian itu — seperti di dalam kes ini, memandangkan yang pajakan plaintif tamat pada 21 Mac 1976, dan selepas itu mereka terus sebagai penyewa bulanan dan gadaian didaftar terkemudian — ia tidak akan mengikat pembeli melainkan jika ia telah dilindungi oleh pengendorsan sebelum tarikh pendaftaran gadaian itu.

(4) Syarat 8 tidak membuat apa-apa perbezaan. Syarat ini hanya bersangkutan dengan penyewaan yang mengikat pembeli. Penyewaan pendek yang kurang daripada tiga tahun yang tidak dilindungi oleh pengendorsan di bawah s 316(1) Kanun itu tidak mengikat defendan, dan tentulah terkeluar daripada batas syarat 8. Apa sekali pun, apa-apa percubaan untuk membentuk kontrak di luar peruntukan statutori yang jelas adalah tidak sah dan tidak berkesan sama sekali kerana melanggar pendapat awam. Syarat 12 mesti dibaca dalam cara sebegini.

(5) Defendan berhak mendapat pemilikan kerana plaintif memiliki harta itu secara haram, iaitu mereka adalah penceroboh atau, paling banyak, pemegang lesen semata-mata dan, mengikut keterangan, telah diberi notis yang cukup sebelum tindakan. Lagipun, penyampaian saman dalam kamar dengan sendirinya adalah satu notis penamatan lesen itu. Sesungguhnya, sebelum penyampaian saman dalam kamar, peguam defendan pada masa itu telah memberikan kepada plaintif satu notis keluar bertarikh 20 November 1980 yang memerlukan mereka keluar dan memberikan pemilikan kosong dalam 14 hari selepas tarikh penerimaan. Ini adalah notis yang lebih daripada cukup kepada seorang yang cuma pemegang lesen.

(6) Pembelaan estoppel berdasarkan penghakiman hakim yang lain tidak terbit kerana tidak boleh ada estoppel terhadap satu statut, terutamanya peruntukan Kanun yang dirujuk.

(7) Perintah deklarasi yang diberikan diubah supaya plaintif diperlukan memberikan pemilikan kosong kepada defendan. Selain daripada kaedah khilaf (slip rule), mahkamah mempunyai kuasa sedia ada untuk mengubah perintahnya supaya membawa maksud yang dikehendaki. Perintah deklarasi semata-mata tidak akan menyampaikan hajat mahkamah.]

[*Editorial Note*: The plaintiffs have appealed to the Supreme Court vide Civil Appeal No 02-373-90.]

A Cases referred to

- 1 *Quinn v Leatham* [1901] AC 495 (fold)
- 2 *Yeap Yok Tee v Lee Boon Bee* [1973] 1 MLJ 3 (refd)
- 3 *Tool Metal Manufacturing Co v Tungsten Electric Co* [1955] 2 All ER 657 (fold)
- 4 *Mst Kauleshwari Ruer v Surajath Rai* AIR 1957 Pat 456 (fold)
- 5 *Hatton v Harris* [1892] AC 547 (fold)

B

Legislation referred to

Land Code (FMS Cap 138) ss 42, 116, 118, 125(i)
National Land Code 1965 ss 213(3), 221(4), 223(1), 227(1), 228(1)(a), 256, 267, 316(1)
Rules of the High Court 1980 O 89

C

SP Annamalai for the plaintiffs.
VM Mohan for the defendants.

Cur Adv Vult

Edgar Joseph Jr J: This case raises the interesting question of the relationship between purchasers of immovable property at a public auction held pursuant to an order of court made under s 256(3) of the National Land Code 1965 ('the Code') and persons in occupation who claim to be tenants thereof.

The history of the matter which calls for the consideration of the court may be stated shortly. The defendants ('the purchasers') had purchased certain immovable property situated at Penang Road, George Town on which stands the Ambassador Hotel ('the disputed property') at a public auction held on 26 July 1989, pursuant to an order for sale dated 14 August 1986 made by the High Court under the provisions of the Code upon the application of the chargees Malayan United Finance Bhd, by Originating Summons No 777/85. Upon the purchasers paying the whole of the purchase price of \$6,000,000 the certificate of sale in Form 16F was issued by the senior assistant registrar on 8 December 1989 and, consequent thereto, the purchasers became the registered proprietors of the disputed property.

The proclamation of sale issued pursuant to the order for sale contained, inter alia, the following conditions of sale:

- 8 The properties are sold subject to all existing tenancies, if any, and all claims of tenants and occupiers by contract, custom, statute or otherwise.
- 12 Upon payment of the balance of the purchase money the purchaser shall be let into possession or the receipt of the rents and profits of the properties.

Since 22 March 1966 the plaintiffs ('the occupants') had been carrying on the business of hoteliers at the disputed property under the name or style of the Ambassador Hotel, they having gone into possession pursuant to a lease in writing duly registered under the Code and bearing presentation no 472, Lease Vol 1, Folio 39 granted to them by the previous owners Saw

Consolidated Securities Sdn Bhd ('the previous owners').

The lease was for a term of ten years at a monthly rental of \$11,000 per month. But by (e) of the annexure to the lease, the occupants had the option to renew the lease for ten years at a monthly rental of \$12,000 and, thereafter, for a further term of ten years at a monthly rental of \$13,000.

Now, the option for renewal clause in the lease, provided, inter alia, that if the lessees were desirous of continuing the tenancy thereby created for a further term of ten years at the expiration of the term thereby granted, they had, six months before the expiry of the tenancy thereby created, to give to the lessors notice in writing of their desire. It was not disputed that the occupants although they continued to be in occupation after expiry of the initial term of ten years, to the present day, had failed to exercise the option either in the manner or within the time specified in the lease or at all and that consequently a condition precedent for renewal had not been fulfilled.

There is authority for saying that a lessee desirous of exercising an option to renew must conform with the conditions in the lease as to its exercise. (See *Hill and Redman on Landlord and Tenant* (16th Ed) at p 162.) I also note that the footnote (b) to p 188, 24 *Court Forms* (2nd Ed) reads: 'Most options to renew require the lessee to serve notice of exercise within a specific time. This and other conditions are construed strictly against the lessee.'

Moreover, s 228 (1)(a) of the Code provides explicitly that the lessee must exercise the option to renew the lease *before* the expiry of the term. Clearly, the occupants in this case had not even complied with that requirement.

It cannot be gainsaid however that upon expiry of the initial term of ten years the previous owners and the occupants had agreed to continue the relationship of landlord and tenant presumably on the basis of a monthly tenancy since rent was payable with reference to the month. Support for this view may be derived from the fact that the previous owners had issued a writ against the occupants, being Civil Suit No 287/89, for the recovery of arrears of rent in respect of the period February 1984 to May 1989, amounting to \$756,000 and for vacant possession. On 3 March 1990, the previous owners obtained judgment for the said sum of \$756,000 but abandoned the claim for possession which was understandable as by then ownership of the disputed property had passed to the purchasers. However, the previous owners found it necessary to levy execution on the judgment debt which they did by way of a writ of seizure and sale and the court bailiff had taken possession of the disputed property and placed security guards

A to prevent entry and exit therefrom, but happily this ended in a settlement.

On 16 February 1990, the purchasers issued Originating Summons No 113/90 claiming against the occupants possession of the disputed property under O 89 of the Rules of the High Court 1980.

B After hearing argument, my brother Wan Adnan J held that as the occupants were tenants holding over after termination of their tenancy, the summary procedure under O 89 did not apply.

Order 89(1) is as follows:

C Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.

D Every judgment must be read as applicable to the particular facts proved, since the generality of expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found (per Lord Halsbury in *Quinn v Leatham*¹ at p 506).

E In my opinion, the ratio decidendi of the judgment of Wan Adnan J was limited to the proposition that as the occupants were tenants holding over after termination of their tenancy the summary procedure under O 89 was not applicable and nothing more. All other observations made by him were thus of necessity, obiter dicta, as counsel for the occupants rightly recognized.

F The purchasers did however appeal against that decision but later withdrew it. The occupants then took the initiative by causing to be issued the writ herein against the purchasers claiming:

- G (a) a declaration that they are the lawful tenants of the disputed property;
- (b) an order that the purchasers and/or their agents, servants or whomsoever be restrained from interfering with or disturbing their lawful and actual possession and use of the disputed property and such injunction as may be just or necessary;
- H (c) damages.

I At the same time, the occupants had on 29 May 1990 successfully applied ex parte for an interlocutory injunction that the purchasers be restrained whether by themselves or by their agents, servants and whomsoever from interfering with or disturbing their occupation and use of the disputed property in any manner whatsoever until further order; an order that the purchasers do remove the security guards placed at the lobby of the aforesaid Hotel Ambassador forthwith and also deliver over forthwith all keys to the main door at the ground floor

thereof which the purchasers had changed and replaced after 5 pm on 28 May 1990 and such further or other order as may be necessary.

The purchasers then applied inter partes for, inter alia, (a) a declaration that possession of the disputed property be delivered to them, (b) that the injunction aforesaid be discharged, (c) that an injunction be granted restraining the occupants their servants or agents from interfering with the purchasers' peaceful possession of the disputed property, and (d) damages.

Before me, counsel for the occupants in his summary of submissions in reply dated 18 June 1990 had stated that the primary facts appearing in the chronology of events were not in dispute and that all the court had to do was to apply the law to those facts in order to determine whether the occupants were in occupation of the disputed property as tenants or as trespassers. I therefore approached the issues which arose for decision upon the application before me on that basis.

It cannot be disputed that upon expiry of the lease on 20 March 1976, as against the previous owners, the occupants were tenants from month to month because, as I have already observed, the occupants did not exercise the option for renewal either within the time or in the manner prescribed by the lease or at all, but merely continued in occupation paying rents with reference to the month.

Now, the Code provides that any lease or sublease for a term exceeding three years may only be created by registration (ss 221(4), 222(4), 227(1)). But, a lease or a sublease for a term not exceeding three years which is called a 'tenancy exempt from registration' is exempt from registration and may be created orally or by a written instrument in any form whatsoever (s 223(2)). In contrast, under the FMS Land Code (Cap 138) ('the former Land Code') the immediate predecessor of the Code, only tenancies for a term not exceeding one year could be created without registration and all leases or subleases for a longer term had to be created by registration (ss 116, 118, and 125(i) thereof).

Another difference between the former Land Code and the Code, which is relevant to the present case, is that whereas formerly, a tenancy exempt from registration had the status of an overriding interest which required no protection against subsequent dealings (s 42 (v) thereof and the case of *Yeap Yok Tee v Lee Boon Bee*³), the present Code cancelled out this exception and although it exempts all short tenancies not exceeding three years from registration, all such tenancies are required to be protected by way of an endorsement in the register document of title, otherwise an unprotected tenancy will not bind the holder of an indefeasible title or interest. This is provided for by s 213(3) of the present Code which, omitting immaterial parts, states:

A ... no tenancy exempt from registration granted after the commencement of this Act shall be binding on —

(a) any person or body to whom the grantor subsequently transfers the reversion expectant thereon, or to whom he subsequently grants any lease, sub-lease, tenancy or charge, or in whose favour any lien over that reversion is subsequently created; or

B (b) any person or body claiming through or under such a person or body,

unless, prior to the date on which the dealing referred to in paragraph (a) takes effect, the tenancy has become protected by an endorsement on the register document of title to the land pursuant to Chapter 7 of Part Eighteen.

C As Dr David Wong says in his book *Tenure and Land Dealings in the Malay States*, at p 454 after reproducing s 213(3):

Thus unless so protected, a tenancy exempt from registration, granted after the commencement of the present Code will be defeated not only by a subsequent registered dealing but also by a subsequent statutory lien and even a subsequent tenancy both the later being non-registrable.

D In the present case, it was common ground that the occupants had not, after expiry of their lease, taken the precaution of protecting their short tenancy of less than three years, by endorsement in the register document of title as provided for in s 316(1). The effect of this omission was to defeat the occupants' tenancy, or in other words, their tenancy was not binding on the purchasers.

F As for any tenancy exempt from registration granted by the chargor *after* the date of registration of the charge concerned, and even with the consent of the chargee, it will not bind the purchaser unless it has become protected by an endorsement under s 316(1) of the Code *prior* to the date of registration of the certificate of sale (see s 267(2)). And, as for any tenancy exempt from registration granted by the chargor *before* the registration of the charge concerned — as in the present case, since the occupants' lease expired on 21 March 1976, after which they held over as monthly tenants and the charge was registered on 15 May 1982 — it will not bind the purchaser unless it has become protected by endorsement *prior* to the date of registration of the charge (see s 267(3)).

H It makes no difference that condition 8 of the proclamation of sale provides that the disputed property was sold subject to all existing tenancies, if any, and all claims of tenants and occupiers by contract, custom, statute or otherwise. This condition must be understood to refer only to tenancies binding on the purchasers. Short tenancies of less than three years not protected by endorsement under s 316 (1) of the Code, are not binding on the purchasers, and are obviously excluded from the contemplation of condition 8. In any event, any attempt to contract out of clear statutory provisions aforesaid would be void and wholly ineffec-

I

tive as being contrary to public policy. Condition 12 must be read in the same light.

The purchasers are therefore entitled to possession as the occupants are in unlawful possession of the disputed property, ie they are trespassers or, at most, bare licensees and, on the evidence, had been given ample notice before action. Furthermore, service of the summons-in-chambers herein was itself a notice of termination of the license. (See *Tool Metal Manufacturing Co v Tungsten Electric Co.*³) Indeed, prior to the issue of the summons-in-chambers, the occupants have had notice when the purchasers' former solicitors served them with a notice to quit dated 20 November 1989 requiring them to deliver vacant possession within 14 days from date of receipt thereof, which is more than sufficient notice to a bare licensee.

The defence of estoppel based on the judgment of Wan Adnan J aforesaid, cannot arise since there can be no estoppel against a statute; specifically, the various provisions of the Code to which I have referred. So, for example, there can be no estoppel from questioning the validity of a document which is required by law to be registered and is not registered. (See *Mst Kauleshwari Kuer v Surajmath Rai.*⁴)

Accordingly, I discharged the interlocutory injunction dated 29 May 1990 made in favour of the occupants and granted the declaration for vacant possession prayed for by the purchasers. Upon the purchasers going into possession of the disputed property the occupants were to be restrained from interfering with the purchasers' peaceful possession thereof. Damages were to be assessed and paid by the occupants upon enquiry by the senior assistant registrar and the purchasers were to have the costs of the proceedings.

Subsequently, after extraction of my order aforesaid, counsel appeared before me, and after hearing argument, I had, in the exercise of my powers under the slip rule, varied the declaratory order aforesaid, so as to require the occupants to deliver vacant possession forthwith to the purchasers. Apart from the slip rule, the court has an inherent power to vary its own orders so as to bring it into harmony with the order which it obviously meant to pronounce (per Lord Watson in *Hutton v Harris*⁵ at p 560). A mere declaratory order would not have conveyed the intention of the court.

Lastly, for the avoidance of doubt, I ordered that such damages as are found by the senior assistant registrar to be payable by the occupants shall be paid to the purchasers.

Application allowed.

Solicitors: *Annamalai & Co; VM Mohan & Co.*

Reported by *PS Ranjan*

A Public Prosecutor v Lee Chee Meng & Anor

HIGH COURT (JOHORE BAHRU) — CRIMINAL TRIAL
NO 58-14-87
JAMES FOONG JC
13 AUGUST 1990

B *Criminal Law — Dangerous drugs — Trafficking — Care and custody of things in room where drugs were found — Exclusive right to use of room — Drugs concealed — Dangerous Drugs Act 1952, ss 37(b), (g), 39B(1)(a) & (2)*

C *Criminal Law — Common intention — Pre-arranged plan — Prior meeting of minds — Penal Code (FMS Cap 6), s 34*

C *Criminal Law — Cautioned statement — Admissibility — Statement not made voluntarily*

D The two accused were charged with trafficking 23.71g of heroin mixed with monoacetyl morphine under s 39B(1)(a) of the Dangerous Drugs Act 1952. The second accused was the girlfriend of the first accused and they were both charged with common intention to commit a crime under s 34 of the Penal Code. The first accused contended that he had no exclusive right to his room.

Held, finding the first accused guilty and acquitting the second accused:

E (1) The first accused's cautioned statement was inadmissible as it was not made voluntarily. He was subjected to threats and beatings; the police had not observed the Lock-Up Rules; the cautioned statement does not contain any statement in the form and answer manner that the first accused understood the caution administered to him; and two different meanings could be referred to in the caution.

F (2) Two elements must be proved in common intention — the accused was either committing the crime or at the scene of the crime and there must be evidence of a common intention. There must be a prior meeting of the minds and presupposes some prior concert.

G (3) There was no evidence to infer that the first accused and second accused had a prior meeting of the minds to commit the said crime. The second accused was a girlfriend of the accused; there were no exhibits besides a blue shirt found in the room that were proved to belong to the second accused and she was not the occupier or had care and control of the room. Under these circumstances the second accused was acquitted without being called upon to make her defence.

H (4) The first accused was a sub-tenant to the room of the premises. He had the care and management of the said room and is presumed to be an occupier of the room under s 37(b).

(5) The drugs were also concealed; they were kept in a shoe box and in a rotan case. Section 37(g) of the Act therefore applies.

I (6) The court could not accept as probable that the first accused never locked his room when he went out. 'Exclusive right' must be viewed in the light of all circumstances of each particular case. Evidence that some of the accused's friends entered the room with or without his permission is not sufficient evidence that the drugs found did not belong to the accused and that he had lost his exclusive use of the room.